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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

## No. 72-922

MARY LOUISE GREEN PASCHALL, ET AL.,
*Appellants,*

VERSUS

CHRISTIE-STEWART, INC., ET AL.,
*Appellees.*

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA

## REPLY BRIEF OF APPELLANTS

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September, 1973

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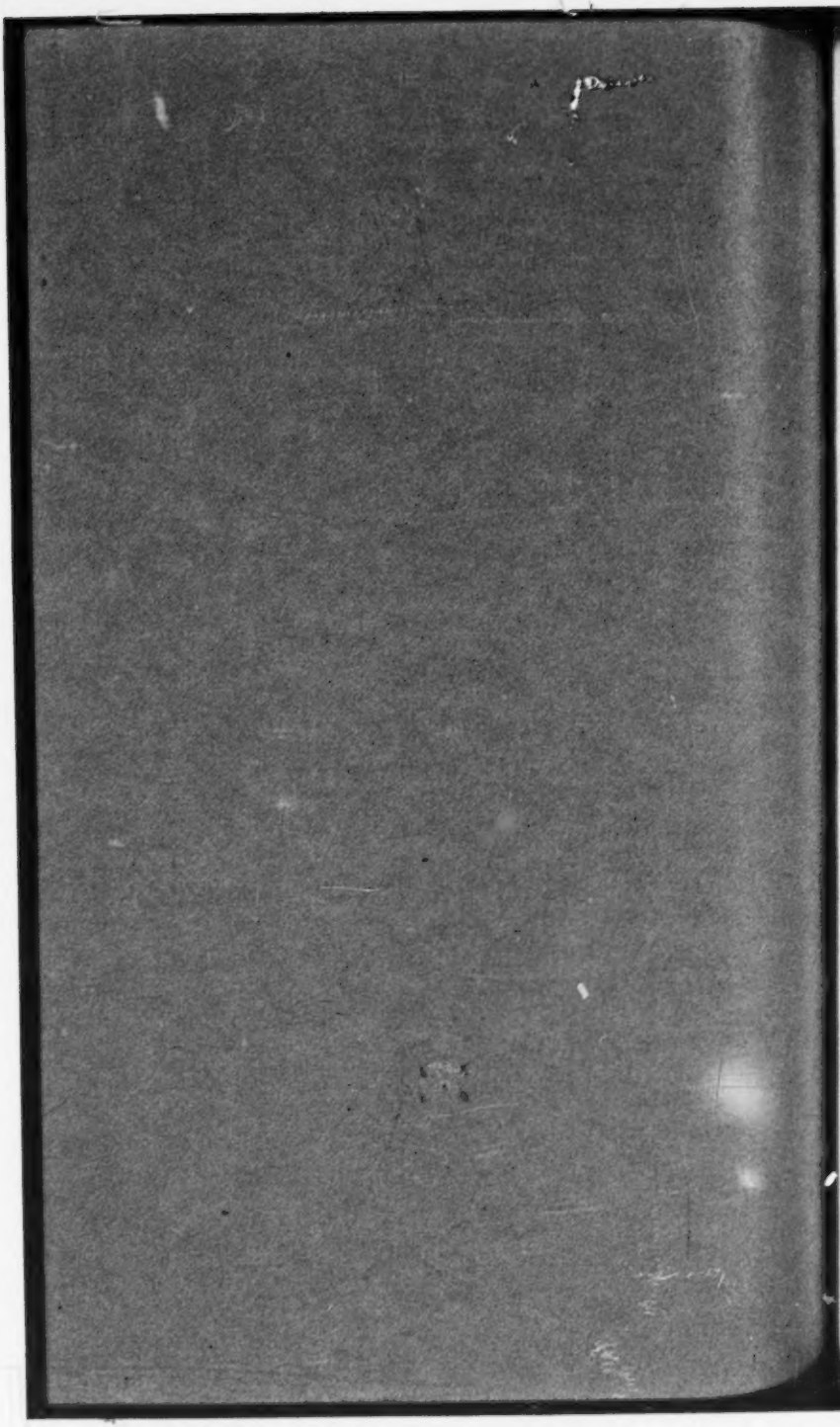

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# In the
# Supreme Court of the United States
OCTOBER TERM, 1972

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## No. 72-922

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MARY LOUISE GREEN PASCHALL, JAN PASCHAL HARDEN, JOHN N. PASCHALL, JR., THE FOURTH NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA, as Executor of the Estate of H. Grady Ross, Deceased, and ZELDA DANNA PASCHALL,

*Appellants,*

VERSUS

CHRISTIE-STEWART, INC., a corporation, R. W. GARRETT and R. H. VAUGHN,

*Appellees.*

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

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## REPLY BRIEF OF APPELLANTS

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### SUPPLEMENTAL STATEMENT OF CASE

In the Appellees' Brief, supplementary facts are stated n pages 1 and 2. With regard to the filing of the Resale Tax Deed and taking possession it should be made clear that ossession was taken of the surface only and that there was o attempt to drill or otherwise explore for the oil, gas or ny other minerals underlying the surface of the land in

question. This was established by the testimony of Mr. Vaughn, one of the Appellees himself (Transcript, on the fourteenth page thereof). Appellants make no claim to the surface.

It should also be clarified that Appellants did not commence this action, but were named defendants in an action filed in January, 1965, by Christie-Stewart, Inc. The service of process in this case was the first notification to Appellants that their mineral rights were claimed by third parties, which claims they immediately challenged by appropriate pleadings timely filed in this case.

## BRIEF AND ARGUMENT

### Re: Proposition I

In their Brief filed herein, Appellees make reference to the inapplicability of the statutory procedures with regard to the Original Sale, concerning Proposition I that no statutorily adequate notice was given Appellants. The pertinence of these procedures and the reason for inclusion of reference thereto in Proposition I of the Brief of Appellants, is this: Prior to the Resale by the County Treasurer, there is no statutorily required notice, adequate under the Constitution, that the landowners' property is in jeopardy. If the statute concerning the Original Sale had provided notice, it would be difficult to argue that the subsequent Resale was made without affording the owner with constitutional notice. However, since no notice was given at the time of the Original Sale, we are therefore entitled to analyze the notice provided for the Resale in terms of whether Constitutional requirements are met.

Under Oklahoma statutes, if the tax sale procedure goes from the Original Sale to a Certificate Tax Deed by reason of a private individual having purchased the tax lien certificate at the Original Sale, the Oklahoma Supreme Court holds that personal notice to the severed mineral owner is necessary or the Certificate Tax Deed will be deemed to cover the surface only; *Walker* v. *Hoffman*, 405 P.2d 57. But, the same Court holds here that if the tax sale procedure goes from the Original Sale to a Resale, where the County is the seller again, no such notice is required. The reasons for this inconsistency were therefore analyzed in the original Brief of Appellants.

In the discussion of the *Walker* decision on page 4 of the Brief of Appellees, *Jenkins* v. *Frederick*, 208 Okla. 583, 257 P.2d 1058, and *Cornelius* v. *Jackson*, 201 Okla. 667, 209 P.2d 166, are cited. On the point of constitutionality, the *Jenkins* case quotes from the *Cornelius* opinion and this same quotation is carried in the Brief of Appellees. However, the *Cornelius* case was decided in 1948, prior to the decision of the United States Supreme Court in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Furthermore, the quotation used is clearly based upon the view that tax sale procedures are *in rem* rather than *in personam*, and therefore personal notice is not constitutionally required. That view was specifically renounced in the *Mullane* opinion:

> ". . . we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state."

The Brief of Appellees, on page 6, also quotes from *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. That case was decided in 1944, also prior to *Mullane*, but is referred to in the latter opinion. The quotation used in support of the position taken by the Brief of Appellees, that the Oklahoma tax sale statute itself is sufficient notice for the individual property owner when *government* is the acting entity, is as follows:

> "All persons having property located within a State and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedures which they set up for those purposes. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highway and public improvements affecting landowners are familiar examples."

Notwithstanding that language from the *Mullane* opinion, it is interesting that "proceedings for the (foreclosure of) assessment of taxes" were later held to require personal notice in *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), and in *Wisconsin E.P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241 (1956); that "the condemnation of land" requires personal notice in *Walker* v. *City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956); and that "the establishment of highway and public improvements" necessitates personal notice to the affected landowners in *Schroeder* v. *City of New York*, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279, 89 A.L.R.2d 1398. It would be idle to challenge the legal concept that property owners "must take note of (the State) statutes affecting the control or disposition of such property

and of the procedures which they set up for those purposes," but where life, liberty, or property is in jeopardy through judicial or administrative action, overriding constitutional precepts come into play. We quote again from *City of Hutchinson:* "there is nothing peculiar about litigation by the Government and its citizens that should deprive those citizens of a right to be heard."

It is the position of Appellants that the distinction drawn by the Oklahoma Supreme Court between the requirements of notice as between a Certificate Tax Deed and a Resale Deed is a denial of equal protection of the laws; *Williams* v. *Rhodes*, 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5 (1968); *Levy* v. *Louisiana*, 391 U.S. 68, 20 L.Ed.2d 436, 88 S.Ct. 1509 (1968); *Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972.) The rights of severed mineral interest owners are made to depend on whether the taking to which they are subjected is under the Certificate Tax Lien foreclosure procedure in which they are entitled to personal, individual notice, or under the Resale procedure in which they are *not* entitled to personal, individual notice, according to the Oklahoma Supreme Court.

**Re: Proposition II**

The Brief of Appellees asserts two primary arguments in response to Proposition II that no constitutionally adequate notice of the Original Tax Sale and of the Tax Resale was given Appellants' predecessors, as owners of previously severed mineral rights. Appellees assert:

(1) It would be too burdensome on the County to give notice individually to owners of severed mineral interests; and

(2) The claim of Appellants is barred by the statute of limitations, and if it is not applied, vested titles will be upset.

(1) Appellees insist how enormous a labor it would be to determine ownership of severed mineral interests in Seminole County. It is not a geographically large area of land nor is it heavily populated. It is the former national domain of the Seminole Nation of Indians, one of the Five Civilized Tribes, removed from Florida to this place in the mid-nineteenth century. All of the county offices are located in the County Court House at Wewoka, a two-story building of modest proportions, built in 1939, with a jail on top. It is shaded by old trees in the sidewalked lawn on the front. One of these trees is the Seminole Whipping Tree, a large pecan, to which aberrant tribesmen were tied toward the turn of the century for appropriate ministrations. A miniature Statue of Liberty has been erected near the entrance. The County Treasurer's office is not only in this same building with the land ownership records of the County Clerk, but is just a few steps down the hall on the first floor. When Christie-Stewart, Inc. desired to purchase an oil and gas lease from all possible claimants to the land here in controversy, it found little difficulty in determining who and where they were, both the tax deed owners (Appellees) and the owners of severed mineral interests (Appellants). How this is such a large order for the County is difficult to understand.

Under the *Mullane* decision, notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the pro-

ceedings in question; *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398. The Supreme Court of Oklahoma has required close investigation of public records to assure that private parties litigant shall have opportunity to appear in proceedings affecting their legally protected interests; *Bomford* v. *Socony Mobil Oil Company*, 440 P.2d 713 (1969), and Rule No. 16 of the Rules for the District Court of Oklahoma, promulgated by the Supreme Court of Oklahoma, Title 12 Okla. Stat. 1971 (1972 Supp.), Chap. 2, Appendix. These pronouncements of the Oklahoma Supreme Court require, where title to land is affected, a search of the local assessor's records, the local county treasurer's records, the local deed records as to the property involved for return addresses on recorded instruments, and local probate records if applicable, in order to determine the names and addresses of the affected parties so that notification can be given them. Only after these investigations prove fruitless, is publication notice by itself reliable. This is in exact compliance with *Mullane*. If any one of such sources had been searched in this case, notification could have been given Appellants' predecessors which would have resulted in actual notice that their severed mineral rights were about to be taken for nonpayment of taxes. Nothing of the sort was done. Appellees now say that such a procedure may be constitutionally necessary for private litigants, but it would be too onerous for *government* to bear. They ask that two different rules apply: one for private litigants, onerous as it might be for them, and a different rule for governmental instrumentalities whereby government need not comply with constitutional requirements because it would be too onerous. Merely

to state such a proposition suggests sufficient dangers of government invasion of private rights as to shock the conscience. In *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the State had pointed out the burden of having to give parents notice of proceedings to determine placement of children in foster homes. To that argument, this Court stated:

> ". . . it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

(2) With respect to the application of the statute of limitation, this argument was not made in the briefs below. Neither the opinion of the Supreme Court of Oklahoma nor that of the Oklahoma Court of Appeals deals with this mat-

ter. In the Motion to Dismiss and/or Affirm filed herein in response to the Jurisdictional Statement of Appellants, Appellees made no argument that any statute of limitation applied. Appellees now raise the argument as a lastditch effort to prevent consideration of the more important constitutional issues on which this case was actually decided below and upon which this Court has accepted jurisdiction. At this late juncture, it would seem the point should be considered waived.

In cases where the question of notice is raised, application of limitation statutes or laches is frequently involved. It is only natural that this is true, because if proper notice had been given, a timely opportunity to be heard would have occurred. Failure to give notice creates the very situation in which the party who was not given notice must come into court "late," asking his remedy belatedly. Thus, for the Court to countenance the assertion of limitations under such circumstances would be to accept the poisoned apple whereby all constitutional rights could be eliminated. Of what value is a constitutional right to notice if, after notice is unconstitutionally withheld, the offended party cannot receive his rights because of mere passage of time before asserting them when he finally discovers the offense?

The Supreme Court of the United States has given little weight to such arguments. In *City of New York* v. *NY, NH & H R.R.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953), the railroad sought to bar the City's liens because they had not been asserted within the statutory time after publication notice. This Court rejected that argument and held in favor of the City and the enforcement of its liens.

In *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), the taxpayer's right of redemption expired before her Committee became aware her property was being sold for unpaid ad valorem taxes. This Court held that notice given to a known incompetent was insufficient to bar her rights when later discovered. In *Walker* v. *City of Hutchinson*, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956), the time authorized by statute had elapsed for an appeal from the compensation awarded in a condemnation. This Court held publication notice was not sufficient to bar the landowner's right to a hearing on just compensation. In *Wisconsin E.P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241 (1956) (refer to the appealed Wisconsin Supreme Court opinion reported at 76 N.W.2d 341), the property owner was assessed for street improvements and he claimed he had no actual notice of the assessment until after it was too late to protest, only publication notice having been given. This Court required the Wisconsin Court to review its affirmance of the assessment in the light of *Mullane*. In *Schroeder* v. *City of New York*, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279, 89 A.L.R.2d 1398 (1962), the landowner had filed no claim for damages from the diverting of a river until after the three-year statutory limitation had elapsed. Only publication notice had been given. The City argued that the limitation barred her rights. This Court held that the limitations could not be asserted because the notice given was not adequate.

In all of the cited cases, this Court was faced with the argument made here by Appellees, that the offended parties acted too late to be permitted to assert their rights—that a

statutory limitation runs against the assertion of those rights. The case with facts closest to the instant case is *Schroeder*. There, the City had changed the course of the Neversink River, which flowed through appellant's land, after giving the statutory notice by publication in a small town newspaper without including her name therein. Posting of such notice also occurred but not on appellant's land. The statute limited a claim for damages to be filed within three years and there are indications that during that three years the flow of water through appellant's land must have made apparent the diversion upstream: "The majority opinion in the New York Court of Appeals seems additionally to have drawn support from an assumption that the effect of the City's diversion of the river must have been apparent to the appellant before the expiration of the three-year period within which the statute required that her claim be filed. 10 N.Y.2d, at 526, 527, 225 N.Y.S.2d, at 213, 180 N.E.2d 568. There was no such allegation in the pleadings, upon which the case was decided by the trial court. But even putting this consideration aside, knowledge of a change in the appearance of the river is far short of notice that the City had diverted it and that the appellant had a right to be heard on a claim for compensation for damages resulting from the diversion. That was the information which the City was constitutionally obliged to make at least a good faith effort to give personally to the appellant—an obligation which the mailing of a single letter would have discharged."

That set of circumstances is similar to the present case in this: Appellees base their argument in reliance upon a

five year statute of limitation on their occupation of the surface of the land here in question. It is clear that during that time they made no attempt to explore or exploit the minerals under the land. They executed and recorded only one oil and gas lease during that time and that is the one challenged in this case. Appellants owned only the severed mineral rights and at no time made any claim to the surface. Accordingly, occupation of the surface by Appellees or anyone else would have put Appellants on no notice or apprehension concerning their severed mineral rights. Had Appellants driven by the land or examined it inch by inch, nothing they could have found on the land would have shown them any indication other than the surface was being occupied by Appellees just as the surface had previously been occupied by others before. Therefore, the possession of the surface that Appellees rely upon to invoke the five year statute of limitations is not applicable because as this Court pointed out in *Schroeder,* the information which the County was "constitutionally obliged to make at least a good faith effort to give personally to the (predecessors of) Appellans—an obligation which the mailing of a single letter would have discharged," was that a sale of the land was to be made for non-payment of taxes and that the sale would be deemed to include the severed mineral rights.

*Walker* v. *Hoffman,* 405 P.2d 57 (Okla. 1965), here again is of interest. In the opinion, the Oklahoma Supreme Court attempts to differentiate between procedure with regard to the Certificate tax lien foreclosure and the Tax Resale, holding that in the first, possession of the surface shall not be considered possession of the minerals while in the Resale situation, possession of the surface may be con-

sidered possession of the minerals. The reason given is that a Resale notice describes the land to be sold, albeit without naming the owners thereof and without requiring personal notice to them in any other way. This describing of the land, according to the Oklahoma Supreme Court, is sufficient to put all persons on notice that the purchaser at the Resale will receive "a virgin and fee simple title to the described tract, including the minerals." That result is based upon the difference between *in rem* and *in personam* procedures which *Mullane* specifically rejected insofar as requirements of the Fourteenth Amendment to the Federal Constitution. Such a diffentiation between statutory procedures creates a situation which denies equal protection of the law to holders of mineral rights affected by a Resale as distinguished from holders of mineral rights affected by a Certificate tax lien, because in the Resale such holders are not entitled to personal notice whereas in the Certificate situation the same type of owner is so entitled. Furthermore, the equal protection of the law is denied by the interpretation that the statute of limitation applies in the Resale situation to severed mineral interest owners through possession of the surface, whereas in the Certificate situation, possession of the surface does not include the minerals. All of this is indicated by the *Walker* decision as applied to the instant case.

Appellees complain that the application of the *Mullane* concept of notice requirements would upset titles based upon tax deeds. Appellees' Brief quotes from *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, to that effect. The quotation deals with the imposition of new requirements

for showing compliance with procedural due process. The *Bomford* opinion had affirmed the lower court's decision that due process by publication service in that case *had fulfilled* all requirements. The Court went further, however, and in effect laid down procedural requirements for future cases to comply with *Mullane,* but stated in the quoted paragraph that these new procedural rules would not apply to prior adjudications. This was not saying that the constitutional requirements of due process in any case would not be fully enforced even if purported titles and claims would be upset. The Constitution is the law of the land regardless of the fact that certain claims may be upset by its enforcement. The *Bomford* opinion specifically recognizes the United States Supreme Court decisions commencing with *Mullane* stating "Oklahoma has long recognized the Mullane doctrine." In the instant case, the Court is asked simply to enforce the Constitution, and it should not withhold its ruling on the possibility that some claimants to other people's property might be upset. The *Bomford* case protected *judgments* of courts rendered before that opinion became final: the instant case affects *tax sales* and will have no upsetting effect on titles perfected by judgments.

The fact that Resale Tax Deeds may have been issued following the prescribed statutory procedure should have no validating influence on them if that statutory procedure violates the Constitution. If that argument were sound, State legislatures could enact any law they desired, even though unconstitutional, and there would be no constitutional protection available, because striking down the

unconstitutional law would upset interests which might be claimed thereunder. What happens to the Constitution then? Where is constitutional protection in such circumstances?

## CONCLUSION

With the facilities available to the County Treasurer at the time of the tax sale here under examination, it would have been a quick and simple procedure to determine who were the owners of the property being affected by the tax sale and to give them personal notice that their property was in jeopardy. Current law in other administrative procedures so requires, and in this age of instantaneous retrieval of information, it is not too much to require notice to all parties affected by such a serious matter as the taking of real property interests. Failure to give such notice renders the procedure void *ab initio*, leaving the parties exactly where they were. To apply a statutory limitation where notice has not been so given would be tantamount to a rejection of the Due Process Clause because it would place within the power of state legislatures the ignoring of constitutional rights by simply reducing the time limitation within which such rights may be asserted.

If the state action here in question receives approval by this Court, either on the main constitutional issue of the requirements of Due Process or on the subsidiary issue of limitations, it will be possible for several states to lower their standards for notice, since many already have provided for personal notice either within the administrative tax sale procedure or through a full judicial tax lien fore-

closure. Oklahoma's least strict requirements will become the model and perhaps will be extended into administrative or judicial procedures other than the tax sale procedure. That danger is not simply theoretical in view of the administrative complexity of modern government, tempting more and more toward "efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

The tax sale should be declared ineffective as to the severed mineral rights for want of notice to the owners thereof.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the following, who are all of the parties required by law to be served in the above case, were this day mailed three copies of the foregoing Reply Brief of Appellants, postage prepaid:

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